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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

8 ELIAS PEÑA, ISAIAH HUTSON, and
9 RAY ALANIS,
10 v.
11 CLARK COUNTY, WASHINGTON,
12 Defendant.

NO. 3:21-cv-05411-DGE

**OPPOSITION TO DEFENDANT'S
MOTION TO CALL WITNESS OUT OF
ORDER**

Note on Motion Calendar: May 22, 2023

14 Plaintiffs respectfully oppose Defendant's request to call defense witness Dr. Eric
15 Doerfler out-of-order via Zoom on May 30, 2023 during Plaintiff's presentation of their
16 case in chief. See Dkt. No. 103.

17 **A. FACTUAL BACKGROUND**

18 Dr. Doerfler is expected to testify regarding Plaintiff Hutson's emotional and
19 physical health. Dr. Doerfler is Hutson's primary care provider and is a damages witness
20 in defense to Hutson's case.

21 Without any evidentiary support, Defendant proffers that Dr. Doerfler is
22 unavailable from June 1 through June 20. Counsel's declaration omits any evidence of
23 Dr. Doerfler's schedule or efforts counsel has made to present Dr. Doerfler through any
24 means other than in court on May 30, 2023 at 10:30am-12:00pm. See Dkt. 104.

25 Plaintiffs oppose Defendant's request because it unfairly and unjustifiably hijacks
26 Plaintiffs' case in chief when there are effective tools to address Dr. Doerfler's
27 scheduling constraints. Plaintiffs' have a due process right to present their case in chief

1 and not have the case distracted where Dr. Doerfler's testimony is irrelevant to the
 2 hostile work environment claims.

3 Clark County does not claim it would be prejudiced if the motion was denied. Nor
 4 can it. There are readily available less prejudicial means to give Defendant an
 5 opportunity to introduce Dr. Doerfler's limited testimony during Defendant's presentation
 6 of their case. Dr. Doerfler's testimony could be preserved by a perpetuation deposition
 7 or Dr. Doerfler could appear by Zoom to allow for live testimony.

8 **B. LEGAL AUTHORITY AND ARGUMENT**

9 The trial court controls the mode and order of examining witnesses to "(1) make
 10 those procedures effective for determining truth; (2) avoid wasting time; and (3) protect
 11 witnesses from harassment or undue embarrassment." Fed. R. Evid. 611(a). The trial
 12 court must ensure that the evidence presented at trial is relevant, Fed. R. Evid. 401, and
 13 that it is more probative than prejudicial, Fed. R. Evid. 403. Accordingly, "courts may
 14 curtail or entirely preclude questioning as to any matter of questionable relevance." 28
 15 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure* § 6164
 16 (2023).

17 The Federal Rules of Evidence allow a party to use a deposition at trial when the
 18 witness is unavailable. Fed. R. Civ. P. 32(a)(4); *see also Holen v. Jozic*, 2018 WL
 19 4518699, at *1 (W.D. Wash. Sept. 20, 2018) ("Perpetuation depositions—also known as
 20 *de bene esse* depositions—preserve testimony for use at trial where the witness may be
 21 unavailable to attend trial."); *Steven Cohen Prods., Ltd. v. Lucky Star, Inc.*, 2016 WL
 22 1170985, at *5 n. 4 (D. Nev. Mar. 23, 2016) ("*De bene esse* depositions are essentially
 23 trial depositions used in place of a witness's live testimony pursuant to Federal Rule of
 24 Civil Procedure 32(a)(4).").

25 Defendant's sole legal authority for its motion, *Johns v. Misty Blue Inc.*, 149 Fed.
 26 Appx. 685, 688 (9th Cir. 2005), does not support the relief requested. In that case, the
 27 Ninth Circuit ruled that "Johns failed to show that Johnson's testimony was important

1 enough to justify delaying the trial." *Id.*, 149 F. App'x at 687. The Ninth Circuit reversed
 2 and remanded that case for the application of the standard of review on a JNOV motion
 3 and Motion for a New Trial. The *Misty Blue* decision dismisses the question of the
 4 unavailable witness quickly because of the limited relevance of the witness.

5 Clark County relies on a concurrence questioning the conclusion that the witness
 6 was not important as follows:

7 His testimony could have resolved the factual dispute as to whether he or
 8 Johns was the active engineer. He could have disputed Fahrenkopf's
 9 testimony about the inspection performed at the end of the previous
 10 season. He could have explained the details about loosening the hose
 clamp when he and Fahrenkopf winterized the fresh water pump. Indeed,
 his was the only testimony that could corroborate that of Johns.

11 *Id.*, 149 F. App'x at 688. In that case, the stakes of the witness' availability were vastly
 12 different because they related to "providing a fair trial to an egregiously injured seaman."

13 *Id.* In contrast, there is no claim in the present matter that Dr. Doerfler could testify to
 14 as to whether Hutson was subject to a hostile work environment.

15 There is no analysis in *Misty Blue* or Defendant's motion as to the standard to
 16 apply in calling a witness out of order, but it is undoubtedly the moving party's burden to
 17 demonstrate the relief requested. And, as opposed to *Misty Blue*, Clark County makes
 18 no claim that the witness relates to liability or their right to a fair trial. In fact, Clark
 19 County does not even claim prejudice.

20 Moreover, Defendant fails to explain when it became aware of the possibility that
 21 Dr. Doerfler would be unavailable. Defendant was aware of the trial date in this action
 22 months in advance and could have taken steps to ensure his availability during their
 23 presentation of the case.

24 CONCLUSION

25 Defendant has not met its burden to call Dr. Doerfler out of order. There is no
 26 evidence of Dr. Doerfler's schedule or efforts to present his damages-related testimony
 27 in a less burdensome way.

1 DATED: May 18, 2023.
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